United States v. Gonzalez-Marichal, No. 05-50331

REINHARDT, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's holding that the district court did not abuse its discretion by allowing the police officer to testify. I dissent, however, from its conclusion that the district judge properly exercised his discretion in deviating from the law of the case when he refused to give a cautionary jury instruction regarding witness Fernando Garcia-Rodriguez's testimony at defendant's second trial. As the majority acknowledges, such a deviation is permissible where, *inter alia,* giving the instruction at the first trial constituted clear error. *United States v. Alexander,* 106 F.3d 874, 876 (9th Cir. 1997). Although it is not entirely clear that the instruction should have been given at the first trial, doing so did not constitute clear error because Garcia-Rodriguez twice testified that the government was not prosecuting him for illegal reentry, and his pending civil suit against the defendant would be furthered if the defendant were found guilty at the criminal trial. The giving of such a cautionary instruction under these circumstances finds some support in our case law. *See, e.g., Territory of Guam v. Dela Rosa,* 644 F. 2d 1257, 1259 (9th Cir. 1981) ("[C]ourts have long recognized that the definition of an informer includes persons who provide evidence against a defendant *for some personal advantage or vindication*, as well as for pay or immunity." (emphasis added)). Moreover, because the government has not pointed to any cases that hold

that giving such an instruction under similar circumstances is improper, I would

conclude that the district judge did not commit clear error in giving the instruction

at the first trial, and therefore hold that his departure from the law of the case at the

second trial was erroneous. Because the first trial resulted in a hung jury and the

only truly significant difference between the trials was the omission of the

instruction in question at the second trial, I would hold the error prejudicial and

reverse.